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August 1, 2023

Patricia S. Connor  
Clerk of Court  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, Virginia 23219

Submitted Electronically via CM/ECF

**Re: No. 23-1078: *B.P.J. v. West Virginia State Board of Education, et al.***

Dear Ms. Connor:

Plaintiff-Appellant recently filed a notice of supplemental authority. *See* ECF No. 150. But *Doe v. Horne*, No. CV-23-185, 2023 WL 4661831 (D. Ariz. July 20, 2023), affords no reason to reverse here.

*First, Horne* found no “persuasive evidence at the preliminary injunction stage” to establish that the law at issue there advanced legitimate governmental interests. ECF No. 150-2, at 15. Yet here, the district court ruled on a complete record at the summary-judgment stage—and found that that the fuller record showed how West Virginia’s law *did* advance legitimate state interests.

*Second, Horne* summarily dismissed evidence showing biological differences between prepubescent males and females, ECF No. 150-2, at 14, and ignored other evidence showing physiological differences between males and females at birth, *id.* at 9. But physiological differences between males and females before and after puberty are relevant to sex-based classifications for sports. The former can persist

Patricia S. Connor  
August 1, 2023  
Page 2

through puberty, while the latter may arise even among those students taking hormones or puberty blockers.

*Third, Horne* applied the wrong standard. It faulted Arizona for failing to show that the specific plaintiffs would “have any athletic advantage over other girls,” ECF No. 150-2, at 14 and for using a “rationale” that could apply to “taller than average girls,” *id.* at 10. But intermediate scrutiny—which applies here—does not require the law to target every athlete. *See Ross v. Early*, 746 F.3d 546, 553 (4th Cir. 2014); *see also Clark, By & Through Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982). That’s strict scrutiny.

*Fourth, Horne* concluded that the athletes there “would not be able to participate in any school sports.” ECF No. 150-2, at 14. In contrast, B.P.J. can still compete on coed teams and teams comprising biological boys.

*Fifth, Horne* determined that biological boys identifying as girls will not displace biological girls in sports. ECF No. 150-2, at 6, 14. As B.P.J.’s circumstances show, the same is not true in West Virginia. *See, e.g.*, ECF No. 142-1, at 14-18.

Thus, *Horne* notwithstanding, the Court should affirm.

Sincerely,

PATRICK MORRISEY  
ATTORNEY GENERAL

/s/ Lindsay S. See  
Lindsay S. See  
*Solicitor General*  
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Patricia S. Connor  
August 1, 2023  
Page 3

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